SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 41

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BILL REICHENBACH, JULIE BASEM, AMY KERNER, and ERIKA ABRAMS,

Plaintiffs

Index No. 155013/2019

-against-

DECISION AND ORDER

JACIN INVESTORS CORP., N.V., JACIN INVESTORS LLC, and NYC YORK HOLDINGS LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. INTRODUCTION

Defendant Jacin Investors Corp., N.V., is the corporate owner of a residential apartment building at 1410 York Avenue in New York County. Plaintiffs claim that co-defendants Jacin Investors LLC and NYC Holdings LLC are the building's co-owners or managing agents. Jacin Investors Corp. denies this claim, but plaintiffs' current motion does not involve those co-defendants, so this issue is irrelevant at this juncture. Plaintiffs Reichenbach, Basem, Kerner, and Abrams are the tenants of record respectively of apartments 3D, 2J, 4C, and 5J in the building. In a decision entered January 19, 2022, the court (Lubell, J.) granted plaintiffs' motion to preclude defendants from producing

outstanding disclosure for the duration of this action and denied defendants' cross-motion for partial dismissal. NYSCEF Doc. 221.

In this motion, plaintiffs seek summary judgment on the four claims in the amended complaint. First, plaintiffs seek a declaratory judgment that apartments 4C and 5J are rent stabilized units for which Kerner and Abrams are entitled to rent stabilized leases. Second, plaintiffs seek a declaratory judgment determining the legal, rent stabilized rents of apartments 2J, 3D, 4C, and 5J. Third, plaintiffs seek a declaratory judgment invalidating a New York City Civil Court stipulation that Abrams and Jacin Investors Corp. executed February 2, 2015, and that removed apartment 5J from rent stabilization. Finally, plaintiffs seek a judgment for rent overcharges that defendants collected for apartments 2J, 3D, 4C, and 5J, treble damages, and attorneys' fees and expenses. Jacin Investors Corp. cross-moves for an award of use and occupancy charges against Abrams.

Even though Jacin Investors Corp. is precluded from presenting evidence opposing plaintiffs' motion, "a movant for summary judgment bears the initial burden of presenting affirmative evidence of its entitlement to summary judgment . . . . Merely pointing to gaps in an opponent's evidence is insufficient to satisfy the movant's burden." Hairston v. Liberty Behavioral Mgt. Corp., 157 A.D.3d 404, 405 (1st Dep't

2018). Plaintiffs' first three claims each request a declaratory judgment "as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." C.P.L.R. § 3001. C.P.L.R. § 3001 authorizes the court to determine the respective rights of parties to a residential lease. E.g., 615 Co. v. Mikeska, 75 N.Y.2d 987, 988 (1990).

II. PLAINTIFFS' FIRST CLAIM

Plaintiffs' first claim seeks a declaratory judgment that apartments 4C and 5J are rent stabilized under the New York Rent Stabilization Law (RSL) and that Kerner and Abrams are therefore entitled to rent stabilized leases at apartments 4C and 5J, as well as an injunction compelling defendants to deliver those leases. Jacin Investors Corp. admits that apartments 2J and 3D are rent stabilized and that the RSL governs Basem's and Reichenbach's tenancies.

Declaratory judgment claims regarding an apartment's rent regulatory status are not subject to a statute of limitations; a tenant may request this relief at any point during a tenancy. 150 E. Third St. LLC v. Ryan, 201 A.D.3d 582, 583 (1st Dep't 2022); Gersten v. 56 7th Ave. LLC, 88 A.D.3d 189, 199 (1st Dep't 2011). Plaintiffs commenced this action May 17, 2019, four weeks before the effective date of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) June 14, 2019. Therefore the pre-

HSTPA version of the RSL governs this action, limiting judicial review of an apartment's rental history to four years before plaintiffs commenced the action. N.Y.C. Admin. Code (RSL) § 26-516 (2018); Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d 332, 348-49 (2020).

An exception to this "lookback rule," however, permits review of an apartment's rental history before the four years if a tenant identifies "'substantial indicia' . . . of 'a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization.'" Id. at 355 (quoting Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d 358, 366-67 (2010)). Nevertheless, neither an increase in rent, standing alone, nor a tenant's skepticism about whether apartment improvements justified an increase establishes indicia of fraud. Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 N.Y.3d 358, 367 (2010); Butterworth v. 281 St. Nicholas Partners, LLC, 160 A.D.3d 434, 434 (1st Dep't 2018); Breen v. 330 E. 50th Partners, L.P., 154 A.D.3d 583, 584 (1st Dep't 2017).

Plaintiffs claim that Jacin Investors Corp. unlawfully deregulated apartment 4C via an unexplained rent increase from $1,010.96/month in 1999 to $1,860.00/month in 2001 and two subsequent unlawful rent increases that raised the unit's rent above the $2,000.00/month deregulation threshold in 2003-2004.

The certified New York State Division of Housing and Commmunity Renewal (DHCR) registration statements support these figures. Plaintiffs also claim that Jacin Investors Corp.'s 2005 DHCR registration statement was fraudulent because it listed apartment 4C as vacant when Kerner was residing in it and that Jacin Investors Corp. did not perform any individual apartment improvements (IAIs), building-wide major capital improvements (MCIs), or other work to justify the rent increases.

Regarding the 2005 DHCR registration statement, Kerner's tenancy in apartment 4C commenced after April 1, 2005, the filing deadline for DHCR registration statements, so Jacin Investors Corp. did not act fraudulently by registering the apartment as vacant that year. Nor do plaintiffs support their allegation that Jacin Investors Corp. performed no IAI work in apartment 4C. To support their contentions regarding the absence of IAIs, plaintiffs rely on an unsworn "DHCR Due Diligence Report" that nonparty STM Associates, Inc., prepared for Jacin Investors Corp.'s attorney in 2014, when Jacin Investors Corp. purchased the building at 1410 York Avenue. Yet plaintiffs lay no foundation for an exception to the rule against hearsay to admit the report and do not present the author's affidavit or deposition testimony. Kerner herself attests that: "No improvements, increases in dwelling space, fixtures, nor furnishings have been made or implemented to my individual unit

since I commenced occupancy in 2005," but does not support plaintiffs' claim that Jacin Investors Corp. performed no qualifying IAI work in apartment 4C before Kerner's tenancy commenced. Aff. of Amy Kerner, NYSCEF Doc. 227, ¶ 4.

Instead, plaintiffs merely express "skepticism about apartment improvements," which does not "establish indicia of fraud." Butterworth v. 281 St. Nicholas Partners, LLC, 160 A.D.3d at 434. Had plaintiffs presented expert evidence that the alleged IAI work in apartment 4C was either not performed or non-qualifying, then the burden of proof on this issue would have shifted to Jacin Investors Corp., which would not have been able to rebut that evidence under the January 2022 preclusion order. See, e.g., Sandlow v. 305 Riverside Corp., 201 A.D.3d 418, 420 (1st Dep't 2022).

Although plaintiffs establish at least one large and unexplained increase in apartment 4C's rent, their other allegations do not establish that Jacin Investors Corp. engaged in a fraudulent scheme to deregulate that unit or otherwise unlawfuly dregulated it. Plaintiffs thus are not entitled to a declaratory judgment that apartment 4C is rent stabilized. Therefore the court denies plaintiffs' motion for summary judgment on their first claim regarding apartment 4C. C.P.L.R. § 3212(b).

Plaintiffs claim that Jacin unlawfully deregulated apartment 5J via a stipulation of settlement that the landlord executed with Abrams February 2, 2015, to resolve a summary nonpayment proceeding in the Housing Part of the New York City Civil Court. In the stipulation, Abrams "specifically withdraws all affirmative defenses and agrees that the subject unit is not rent stabilized." Aff. of Zachary G. Meyer Ex. M, NYSCEF Doc. 244. The Rent Stabilization Code (RSC), 9 N.Y.C.R.R. § 2520.13, however, provides that: "An agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code is void." Landlords and tenants may not evade the rent regulation laws "by the expedient of entering private agreements purporting to take a lease out of the rent-regulation schema." 204 Columbia Hgts., LLC v. Manheim, 148 A.D.3d 59, 68 (1st Dep't 2017) (quoting 390 W. End Assoc. v. Harel, 298 A.D.2d 11, 16 (1st Dep't 2002)). See Georgia Props., Inc. v. Dalsimer, 39 A.D.3d 332, 334 (1st Dep't 2007); Drucker v. Mauro, 30 A.D.3d 37, 38 (1st Dep't 2006). Because the stipulation executed February 2, 2015, sought precisely that end, it is unenforceable. Plaintiffs thus are entitled to a declaratory judgment that apartment 5J is rent stabilized and that Jacin Investors Corp. must register the apartment as rent stabilized with DHCR and issue a rent stabilized lease to Abrams. C.P.L.R. § 3001. Therefore the court grants plaintiffs' motion for summary judgment on their

first claim regarding apartment 5J. C.P.L.R. § 3212(b) and (e). The court addresses the monthly legal regulated rent to be charged in that lease below.

III. PLAINTIFFS' SECOND CLAIM

Plaintiffs' second claim seeks a a declaratory judgment determining the legal, rent stabilized rents of apartments 2J, 3D, 4C, and 5J. Already having determined that apartment 4C is not rent stabilized, the court denies plaintiffs' motion for summary judgment on their second claim regarding apartment 4C. The court also has determined, however, that apartment 5J is rent stabilized. Moreover, Jacin Investors Corp. does not dispute that apartments 2J and 3D are rent stabilized.

Under the pre-HSTPA version of RSL § 26-516, an apartment's "legal regulated rent . . . shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement . . . plus in each case any subsequent lawful increases and adjustments." The DHCR rent histories of plaintiffs' apartments show that their "legal regulated rents" on May 17, 2015, the base date four years before commencement of this action, were: $2,022.90/month for apartment 2J, $1,772.29/month for apartment 3D, and no rent registered for apartment 5J, which was listed as an exempt apartment for which registration was not required.

> [U]nder the prior law [the pre-HSTPA version of RSL § 26-516], review of rental history outside the four-year lookback period was permitted only in the limited category of cases where the tenant produced evidence of a fraudulent scheme to deregulate and, even then, solely to ascertain whether fraud occurred--not to furnish evidence for calculation of the base date rent or permit recovery for years of overcharges barred by the statute of limitations. In fraud cases, this Court sanctioned use of the default formula to set the base date rent.

Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d at 355. Thus plaintiffs must demonstrate that Jacin Investors Corp. committed fraud in connection with each apartment's legal regulated rent on the base date to obtain a determination of each apartment's rent on the base date. Although neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements establishes indicia of fraud, Butterworth v. 281 St. Nicholas Partners, LLC, 160 A.D.3d at 434, plaintiffs meet their burden.

The DHCR registration history for apartment 2J shows an increase in the unit's legal regulated rent from $663.96/month in 2009 to $1,500.00/month in 2010, noting that the increased rent was due to a vacancy. The tenant who vacated apartment 2J in 2010 had rented the apartment for 25 years, since 1984. When that tenant vacated, 9 N.Y.C.R.R. § 2522.8(a)(2) entitled Jacin Investors Corp. to increase the apartment's rent by adding a 20% vacancy increase ($132.79) and a "longevity increase" of .6% of the monthly rent for each of the 25 years. Ador Realty, LLC v.

Division of Hous. & Community Renewal, 25 A.D.3d 128, 131-32 (2d Dep't 2005). The prior tenant's rent ranged from $334.49/month in 1984-85 to $663.96/month in 2008-2009, the median being $480.21/month and the midpoint $499.24/per month. Using 500.00/month for purposes of a rough calculation, the longevity increase would only be $75.00. These two increases partially explain the rent increase for apartment 2J between 2009 and 2010, but do not fully explain this increase that more than doubled the apartment's rent.

In any event, the DHCR records show that Basem first took possession of apartment 2J April 1, 2012, and that Jacin Investors Corp. increased the apartment's rent in 2012, 2013, and 2014 due to alleged MCI expenditures for the building. In contrast, Basem attests that "no building-wide improvements have been made to the Premises since I commenced occupancy in 2012." Aff. of Julei Basem, NYSCEF Doc. 229, ¶ 4. The January 2022 preclusion order bars Jacin Investors Corp. from presenting evidence regarding any alleged MCI work. Plaintiffs' combination of evidence thus demonstrates indicia of fraud in Jacin Investors Corp.'s calculation of apartment 2J's legal regulated rent. Nolte v. Bridgestone Assocs. LLC, 167 A.D.3d 498, 499 (1st Dep't 2018).

The DHCR registration history for apartment 3D similarly shows (1) an increase in the unit's legal regulated rent from

$1,207.96/month in 2009 to $1,532.95/month in 2010, plainly exceeding the 2.5% increase that the RGBO order then in effect permitted for one year renewal leases, $30.20, and (2) MCI increases also added to this apartment's rent in 2012, 2013, and 2014. Reichenbach attests that: "I commenced occupancy in 2005, and to my knowledge, no building-wide improvements have been made to the Premises since such commencement." Aff. of Bill Reichenbach, NYSCEF Doc. 230, ¶ 4. Again the January 2022 preclusion order bars Jacin Investors Corp. from presenting evidence regarding the alleged MCI work. Therefore plaintiffs' evidence also demonstrates indicia of fraud in Jacin Investors Corp.'s calculation of apartment 3D's legal regulated rent.

Finally, the court's determination that apartment 5J was unlawfully deregulated via the void Civil Court stipulation that Jacin Investors Corp. executed with Abrams February 2, 2015, establishes fraud in that apartment's deregulation. The stipulation was a conscious strategy to remove the apartment unlawfully from rent stabilization protection. Conason v. Megan Holding, LLC, 25 N.Y.3d 1, 15-16 (2015); Thornton v. Baron, 5 N.Y.3d 175, 180 & n.3; Montera v. KMR Amsterdam LLC, 193 A.D.3d 102, 108 (1st Dep't 2021).

In sum, plaintiffs' evidence establishes that Jacin Investors Corp. engaged in fraudulent schemes to deregulate or inflate the rents of apartments 2J, 3D, and 5J, which caused

these apartments' rents on the base date May 17, 2015, to be unreliable. To the extent plaintiffs must show Jacin Investors Corp. engaged in a fraudulent deregulation scheme, versus other fraudulent conduct, a fraudulent scheme to inflate rents so they rise above the deregulation threshold, or they rise close enough to the threshold to surpass it upon the next vacancy or Rent Guidelines Board increase, is a fraudulent deregulation scheme. Montera v. KMR Amsterdam LLC, 193 A.D.3d at 107; 435 Cent. Park W. Tenant Assn. v. Park Front Apts., LLC, 183 A.D.3d 509, 510 (1st Dep't 2020). This finding, however, does not end the inquiry.

Plaintiffs suggest that the court may search the record to determine the rent, but to do so for apartments 2J and 3D that Jacin Investors Corp. admits are rent stabilized would require a "reconstruction method" that violates the pre-HSTPA version of RSL § 26-516. Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d at 358. Although plaintiffs' second claim seeks only a declaratory judgment setting the legal regulated rents for apartments 2J and 3D, their fourth claim seeks judgments for rent overcharges that Jacin Investors Corp. collected in excess of those rents. Because the Court of Appeals forbade the "reconstruction method" in connection with pre-HSTPA rent overcharge claims, this court may not award reimbursement of overcharges employing that method, and

therefore it would be pointless to declare the legal regulated rents on which such an award would be based. See, e.g., Bower & Gardner v. Evans, 60 N.Y.2d 781, 782 (1983); Karakash v. Del Valle, 194 A.D.3d 54, 65 (1st Dep't 2021). Therefore the court denies plaintiffs' motion for summary judgment on their second claim regarding apartments 2J and 3D. C.P.L.R. § 3212(b).

Where Jacin Investors Corp. did unlawfully deregulate an apartment, here apartment 5J, the court sets the apartment's base date legal regulated rent via the "default formula" to remedy a rent overcharge under the pre-HSTPA version of RSL § 26-516. Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal, 35 N.Y.3d at 355. Under that formula, the base date rent of a comparable rent stabilized apartment substitutes for the base date rent of the unlawfully deregulated apartment and becomes the unit's new "legal regulated rent." 9 N.Y.C.R.R. § 2522.6(b). See, e.g., Gridley v. Turnbury Vil., LLC, 196 A.D.3d 95, 100 (2d Dep't 2021). Plaintiffs have not identified a rent for a comparable apartment to substitute and fix as apartment 5J's new base date legal regulated rent. Until plaintiffs do so, the court may not employ the default formula to grant a declaratory judgment of the apartment's rent. Therefore the court also denies plaintiffs' motion for summary judgment on their second claim regarding apartment 5J. C.P.L.R. § 3212(b). Plaintiffs must present the necessary evidence at trial.

IV. PLAINTIFFS' THIRD AND FOURTH CLAIMS

Plaintiffs' third claim seeks a declaratory judgment that the Civil Court stipulation executed February 2, 2015, by Jacin Investors Corp. and Abrams is void, which the court already has determined for the reasons explained above. Plaintiffs thus are entitled to a declaratory judgment that the stipulation is void. C.P.L.R. § 3001. Therefore the court grants plaintiffs' motion for summary judgment on their third claim. C.P.L.R. § 3212(b) and (e).

Plaintiffs' fourth claim seeks judgments for rent overcharges that Jacin Investors Corp. imposed on apartments 2J, 3D, 4C, and 5J. Already having determined that plaintiffs have shown no fraud in apartment 4C's deregulation and that its base date rent is therefore reliable, the court denies plaintiffs' motion for summary judgment on their fourth claim regarding to apartment 4C. C.P.L.R. § 3212(b). As a result, and in the absence of evidence that Jacin Investors Corp. charged and Kerner paid rent above the amount in her 2015 lease, she fails to sustain her rent overcharge claim.

Although sufficient indicia of fraud establish that the base date rents of the other plaintiffs' apartments are unreliable, plaintiffs have not presented alternate rents from comparable rent stabilized apartments in the building to substitute as the new legal regulated base date rents for apartments 2J, 3D, and 5J

pursuant to the default formula. Therefore the court also denies plaintiffs' motion for summary judgment on their fourth claim regarding apartments 2J, 3D, and 5J. Id. Whether the court will set new regulated base date rents for these apartments remains an issue for trial.

V. DEFENDANTS' CROSS-MOTION

The court denies defendants' cross-motion for $97,575.00 in accrued use and occupancy charges for apartment 5J against Abrams and for continued use and occupancy charges at $2,250.00/month pendente lite. Defendants never counterclaimed against Abrams for unpaid rent and never raised her nonpayment of rent in their affirmative defenses. Therefore no claim against Abrams for unpaid rent is before the court. Without a claim for Abrams's unpaid rent, and without a complete claim for a rent overcharge, any calculation of rent due would be arbitrary at this juncture.

VI. CONCLUSION

For the reasons explained above, the court grants plaintiffs motion for summary judgment to the extent that the court declares and adjudges that:

1. Apartment 5J in the building owned by defendant Jacin Investors Corp., N.V., at 1410 York Avenue in New York County is rent stabilized; and

2. Plaintiff Abrams is entitled to a rent stabilized lease for apartment 5J from Jacin Investors Corp.; and

3. Jacin Investors Corp. must register apartment 5J as rent stabilized with the New York State Department of Housing and Community Renewal; and

4. The stipulation of settlement that plaintiff Abrams executed with Jacin Investors Corp. February 2, 2015, to resolve the summary nonpayment proceeding commenced against her in the Housing Part of the New York City Civil Court in New York County under Index Number L&T 84207/2014 is void and unenforceable in violation of 9 N.Y.C.R.R. § 2520.1; and

5. Upon plaintiffs' motion for summary judgment on their second claim regarding plaintiff Abrams and for summary judgment on their fourth claim regarding plaintiffs Basem, Reichenbach, and Abrams, Jacin Investors Corp. engaged in a fraudulent scheme to deregulate apartments 2J, 3D and 5J, which caused these apartments' rents on the base date May 17, 2015, to be unreliable. C.P.L.R. § 3212(b) and (e).

The legal regulated rents for these three apartments and the rent overcharges that Jacin Investors Corp. collected in excess of the legal regulated rents remain issues for trial. The court denies the remainder of plaintiffs' motion and denies defendants' cross-motion. C.P.L.R. § 3212(b).

DATED: September 20, 2023

LUCY BILLINGS, J.S.C.

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